

In *Bankers & Traders Insurance Co. Ltd. v. National Insurance Co. Ltd.*⁽⁵⁾ the Privy Council had to decide which of the two insurance companies was liable to satisfy the judgment obtained against the driver. In delivering the judgment of the Board Lord Scarman touched on section 80 of the Ordinance at page 402:

"Section 80 of the Ordinance imposes a duty upon insurers to satisfy judgments against persons insured in respect of third party risks"

He pointed out at page 403 that:

"An attempt was made before the Board by counsel for the owner's insurers to argue that in construing section 80(1) one must disregard the terms of the policy. The submission is flatly contradicted by the language of the subsection which expressly directs attention to the liability covered by 'the terms of the policy'. The Ordinance proceeds upon the basis of the terms of the policy, subject only to the specified exceptions and restrictions contained in sections 78 and 79"

Looking at the wordings of section 80(1) of the Ordinance we cannot say that the learned Judge was wrong in his interpretation. The insurer is not bound by statute to pay the third party the judgment given in his favour but only "any sum payable thereunder." Moreover, the insurer does not appear to have to pay the costs of the proceedings but only "any sum payable in respect of costs". The same seems to apply to interest which is limited to "any sum payable in respect of interest". In our view, such a construction appears to find support in section 80(4) of the Ordinance which does not refer to the judgment given in favour of the third party but only "the amount which an insurer becomes liable under this section to pay". In short, in our judgment, the insurer is under a duty to pay the amount which the insured person has been ordered by the trial court to pay the third party including the insured's share of the taxed costs and interest under the judgment.

In this case the trial Judge gave judgment in favour of the third party and apportioned the liability as well as the damages to be paid by the parties. Apparently, the trial Judge was acting under section 10(2) of the Civil Law Act, 1956 under which the court would have power to exempt any person from liability to make contribution or to direct that the contribution to be recovered from any person shall amount to a complete indemnity. The trial Judge did not deem fit to exercise his discretion nor was he asked to do so on the facts of this case.

A In our view, the word "liability" used in section 80(1) of the Ordinance means "liability covered by the term of the policy." Moreover, the right of the third party to enforce a judgment given against an insured person is a right given to him by statute and not under the common law.
B As such the right of the third party is subject to the terms and conditions of the insurance policy. (See *Austin v. Zurich General Accident and Liability Insurance Co. Ltd.*⁽⁶⁾ and the relevant provisions of the statute, viz. section 80 of the Ordinance). It is also important that section 80 of the Ordinance should be interpreted subject to section 10(1) and (2) of the Civil Law Act, 1956 in order to bring it in harmony with the development of the law.
C

The learned Judge had considered the implication of section 80 of the Ordinance. He held that the policy only covered the owner and the driver of the motor lorry but not the rider of the motor vespa who was covered by another insurance. The insurer was only responsible to satisfy the judgment against the insured. The insurer was never under any risk in respect of the motor vespa within the terms and conditions of the policy at the time of the accident. So that the third party cannot expect the insurer to be liable for the judgment obtained against the rider of the motor vespa.
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E

We have no reason to differ from the learned Judge in construing section 80(1) of the Ordinance. Accordingly, we would dismiss the appeal with costs. Deposit to respondent on account of taxed costs.
F

Appeal dismissed.

Solicitors: *Sandu & Co.; H.R. Sankey & Co.*

H TEOH HOE CHYE v. PUBLIC PROSECUTOR YEAP TEONG TEAN v. PUBLIC PROSECUTOR

[S.C. (Abdul Hamid C.J. (Malaya), Seah & Abdoolcader S.C. JJ.) August 18 & September 18, 1986]

[Kuala Lumpur — Supreme Court Criminal Appeal Nos. 4 and 5 of 1986]
I

Criminal Law and Procedure — Charge of trafficking in dangerous drugs — Serious break in chain of evidence affecting proof of identity of exhibits — Failure to call witness giving rise to serious gap in prosecution case — Appeal allowed — Dangerous Drugs Act, 1952, s.39B(1) — Courts of Judicature Act, 1964, s.60(1).

Evidence – Break in chain of evidence – Failure to call witness – Decision to call or not to call witness – Serious gap in prosecution case.

In this case the facts were that as a result of information received, a U.S. Drug Enforcement Administration Agent (the agent) was introduced to the second appellant sometime in December 1980. A few meetings took place subsequently. The purchase of the heroin was discussed among the agent, the second appellant, and the informant. Sometime in March 1981 the purchase price was agreed and the second appellant was to arrange for the supplier to deliver the drugs to a hotel room. A plan was conceived. As part of the plan the informant was to fetch the second appellant and the supplier from some place and take them to a room at Rasa Sayang Hotel to meet the agent. The informant would then accompany the supplier (identified by the agent as the first appellant) to collect the heroin while the agent was to wait in the room. It was also part of the plan that the informant would give a signal after the first appellant had collected the drugs.

On March 10, 1981, at about 2.55 p.m., a party of eight customs officers took up position at Rasa Sayang Hotel. At 3.50 p.m. the second appellant arrived at Room 303, Rasa Sayang Hotel, with the informant and the first appellant. After the bag containing the money was inspected by the first appellant, the informant accompanied him to a car parked at the hotel car park.

At about 4.20 p.m. Encik Low Tak Pun, Superintendent of Customs (Supt. Low), a member of the customs ambush party, saw the first appellant walking to the lobby carrying a brown bag and proceeding towards a poster board. The first appellant placed the bag on the floor and waited there. Supt. Low then saw the informant who was near the in-house telephone booth giving the prearranged signal to effect arrest by lifting up the phone. Supt. Low signalled his officers to effect the arrest. Upon arrest Supt. Low took possession of the brown bag. From there he took the first appellant to the car parked under the porch in front of the hotel lobby. Inside the car Supt. Low examined the bag and found 10 packages wrapped in brown paper. Meanwhile the informant phoned the agent to tell him and the second appellant that the first appellant had been arrested. Both the agent and the second appellant came down to the lobby. The second appellant was then arrested.

From the hotel both the first and second appellants were taken to Supt. Low's office at Weld Quay, reaching there at about 5.20 p.m. While they were there, Supt. Low handed the bag which was believed to contain the drugs to the Superintendent of Customs, Lum Weng Foo (Supt. Lum). No evidence was led as to what Supt. Lum did with the exhibits. The evidence however disclosed that at approximately 7.40 p.m. on that evening Supt. Low arrived at the Customs Office accompanied by Mr. Law Yong Tong, the chemist, who conducted an initial test of the drugs. After the test, Supt. Low said that he weighed the 10 packages and kept the exhibits in his office under lock and key.

The first appellant and the second appellant were subsequently charged and they were found guilty and sentenced to death. They appealed to the Supreme Court and on the appeal it was argued that the learned trial judge had erred in law (a) in not concluding that the non-calling of Supt. Lum, the Investigating officer, was fatal to the prosecution case;

(b) in not concluding that there was a breach in the chain of evidence relating to the exhibits.

Held: (1) fundamentally the matter in issue in this case is not whether there was a failure to call or not to call the investigating officer but whether the failure to call a particular witness gave rise to a serious gap in the prosecution case;

(2) in this case there was a serious break in the chain of evidence affecting proof as to the identity of the exhibits;

(3) the decision whether to call a witness or not to call a witness including a witness from whom a statement has been taken is always the right of the prosecution. In so far as the trial court is concerned, its duty is essentially to decide whether on the evidence before it the prosecution has proved its case, and if there are unsatisfactory features in the prosecution case to determine whether, in the light of such features, the prosecution case falls short of proof beyond reasonable doubt;

(4) the law is clear that it is unnecessary to call evidence to ensure that there is no break in the chain of evidence but where a doubt as to the identity of an exhibit arises, a failure to adduce evidence to provide the necessary link in the chain of evidence would be fatal to the prosecution case. In this case there was such a failure;

(5) in the particular circumstances of this case, the failure to call the witness had caused a serious break in the chain of evidence relating to the identity of the exhibits. The break was so serious that there could not be any statutory cure;

(6) the appeal of the appellants should therefore be allowed and their conviction set aside.

Cases referred to:

- (1) *Muhammad Sharif v. State* [1972] P. Cr. L.J. 1259, 1260.
- (2) *A.K.M. Reza P.L.D.* 1958 Dacca 111, 113.
- (3) *Samsudin v. Public Prosecutor* [1962] M.L.J. 405, 407.
- (4) *Abdullah Zawawi v. Public Prosecutor* [1985] 2 M.L.J. 16.
- (5) *Au Ah Lin v. Public Prosecutor* [1963] M.L.J. 365.
- (6) *Mat v. Public Prosecutor* [1963] M.L.J. 263.
- (7) *Public Prosecutor v. Tahir bin Kassim* [1985] 1 M.L.J. 381, 384.
- (8) *Mahbub Shah v. King Emperor* (1945) 72 I.A. 148, 158; A.I.R. 1945 P. C. 118.
- (9) *Public Prosecutor v. Tan Hock Hai* [1983] 1 M.L.J. 163, 164.
- (10) *Su Ah Ping v. Public Prosecutor* [1980] 1 M.L.J. 75.
- (11) *Sia Soon Suan v. Public Prosecutor* [1966] 1 M.L.J. 116.

I HIGH COURT. (October 14, 15, 17, 18, 21-24 & November 1, 1985).

Ahmad bin Haji Maarop (Deputy Public Prosecutor) for the prosecution.

Karpal Singh for the 1st accused.

K. Kumaraendran (V. Sithambaram with him) for the 2nd accused;

Cur. Adv. Vult.

Mohamed Dzaiddin J.: Both accused persons were charged as follows:

"That you jointly on the 10th day of March 1981 at about 4.20 p.m., in the lobby of Rasa Sayang Hotel, Batu Ferringhi, in the District of Georgetown, in the State of Penang, in furtherance of the common intention of you both, did on your own behalf traffic in dangerous drugs, to wit, 1608.7 grammes of heroin and that you have thereby committed an offence under Section 39B(1)(a) of the Dangerous Drugs Act, 1952 and punishable under Section 39B(2) of the same Act read with Section 34 of the Penal Code."

According to the prosecution evidence, some time in December 1980, one Raymond James Mckinnon (P.W.4), a Drug Enforcement Administration agent attached to the American Embassy in Kuala Lumpur was introduced by an informant to an individual named 'Tony' at Hotel Merlin Pulau Pinang. P.W.4 identified accused No.2 as the person named 'Tony'. P.W.4 was introduced as a rich American owning a yacht in Malaysia who was interested to purchase drugs. He discussed with accused No.2 and told him that he would take delivery of the heroin in his yacht and would transport the drugs to Australia and the United States. Accused No.2 told him that he had a source of supply for the drugs. At this meeting they merely discussed in general terms the price of the drugs and they agreed that accused No.2 would make the necessary arrangement for the delivery of the drugs. P.W.2 agreed to meet him again when he was ready. The second meeting between them was sometime in the middle of January 1981 also at Hotel Merlin. During this meeting, accused No.2 informed P.W.4 that he was able to deliver the drugs. However, they could not agree on the arrangement for the transaction because his suppliers were asking for the money in advance. Accused No.2 assured P.W.4 that he would try to get a different supplier and both of them agreed to meet again. The third meeting was in February 1981, where they met briefly. P.W.2 could not recall the exact location. However, what transpired at that meeting was that accused No.2 had told him that he had a new source of supply of the drugs and assured him that this supplier was prepared to do the transaction without money being paid in advance.

On March 10, 1981, P.W.4 met accused No.2 and the informant at about 11.00 a.m. at Hotel Merlin coffee house to discuss the sale of the drugs. Accused No.2 told him that his source of supply had moved from Haadyai to Penang. He said he

had 10 pounds of heroin available and the deal could take place as soon as possible. They agreed that the price was M\$13,000.00 per pound and the transaction would be done in a hotel room. P.W.4 told accused No.2 to contact him by phone at Hotel Merlin at 1.30 p.m. so that he could inform accused No.2 the place of the transaction. After the meeting, P.W.4 left for Rasa Sayang Hotel, Batu Ferringhi where he booked two adjoining rooms No. 303 and 304. After checking the rooms, he left for Springtide Hotel, Tanjong Bunga at about 12.00 noon.

At Springtide Hotel, P.W.4 met Supt. Low Tak Fun (P.W.2), the informant and Mr. James Dockerey, another D.E.A. agent and briefed them on the proposed transaction which was to be carried out in room 303 Rasa Sayang Hotel the same afternoon. P.W.4 told them that accused No.2 and his supplier would deliver 10 pounds of heroin in a hotel room. After both the supplier and accused No.2 were satisfied that he had the money and that it was safe to do the transaction, the supplier would then bring the heroin to the room. As part of the plan, the informant would go to the Sunrise Towers, Bagan Jermal at 3.00 p.m. to fetch accused No.2 and to accompany him to the room at Rasa Sayang and thereafter to accompany the supplier to collect the heroin. Upon inspection of the heroin, the informant was to give a signal to the customs officers at the lobby of the Rasa Sayang to indicate there was heroin and to effect arrest. The prearranged signal would be for the informant to pick up the in-house telephone in the hotel lobby to call P.W.4.

After this briefing, P.W.4 left for Rasa Sayang Hotel. P.W.2 returned to his office where he detailed a party of 8 customs officers to assemble at Wisma Persekutuan, Jalan Northam. There, he informed the officers about the drugs transaction which was to take place at Rasa Sayang on the same afternoon. P.W.2 and his party left for Rasa Sayang and on arrival took up positions in the hotel lobby as shown in his sketch plan (P9). In the meantime, P.W.4 was already in his room 303 waiting for the arrival of Accused No.2, the supplier and the informant. Mr. James Dockerey and two customs officers, Peara Singh (C.O.461) and Awang bin Taib (C.O. 306) were in the adjoining room 305 where P.W.4 had placed a receiver in room 305 for them to listen to what transpired in room 303.

At about 3.50 p.m. accused No.2 arrived together with the informant and accused No.1

whom accused No.2 introduced as the supplier. They had a brief conversation about trusting each other during the transaction. Accused No.1 wanted to count the money to make sure that he had sufficient amount. P.W.4 gave him the bag which contained M\$130,000.00 in cash. Accused No.1 was satisfied. P.W.4 then asked how long it would take to deliver the heroin. Accused No.2 replied saying that the drugs was in the boot of the car parked at the hotel carpark. At about 4.15 p.m. accused No.1 and the informant left for the car to collect the drugs. However, both P.W.4 and accused No.2 remained in the room.

Now, returning to the scene at the hotel lobby, at about 4.20 p.m. P.W.2 noticed accused No.1 returning to the lobby carrying a brown bag and walking towards a poster board. He placed the bag on the floor and waited there. Then, P.W.2 noticed the informant near the in-house telephone booth lifting up the phone. This was the prearranged signal to effect arrest. On seeing this P.W.2 gave signal to his officers in the lobby. He then rushed up to accused No.1 and identified himself. He placed him under arrest. Customs officer Seah (C.O.227) handcuffed Accused No.1's right hand whilst P.W.5 caught hold of his left hand. P.W.2 then took possession of the brown bag P3. He was taken to a car registration No WF 9675 which was parked under the porch in front of the Hotel lobby. Whilst inside the car, P.W.2 examined P3 which contained 10 packages wrapped in brown paper (Exh. 4A - 4J). He opened one package and found a plastic bag containing granular substance suspected to be heroin. He showed the package to Accused No.1.

In the meantime at about 4.30 p.m., P.W.4 received a telephone call from the informant from the lobby informing him that accused No.1 had been arrested. He then told accused No.2 that something had gone wrong downstairs and that they should go down to find out what had happened. On reaching the hotel lobby, they parted company. Accused No.2 was arrested by P.W.2 and his customs officers as soon as he came out of the hotel lobby. P.W.4 left the hotel by the rear exit leading to the beach.

According to the evidence of P.W.2 after both accused were arrested they were taken to his office at Weld Quay. Peara Singh (C.O.461) drove motor-car No. WM 7633 (P7) with Awang @ Che Mat bin Taib (C.O.306) and Mansor bin Nayan (C.O.58). On arrival at the office at about 5.20 p.m. P.W.2 handed P3 which contained the drugs (P4A-P4J),

A the car P7 and both accused persons to Superintendent of Customs Lum Weng Foo. Then at about 7.40 p.m. on the same day, P.W.2 went with Seah Cheng Chuan (C.O.227) to fetch Mr. Law Yong Tong (P.W.1) at his residence at Rose Avenue. On arrival at the Customs office, P.W.1 conducted an initial test of the drugs in P3 and found it to be dangerous drugs under the Act. P.W.2 then weighed the 10 packages and found it to weigh 4.66 kg. He kept the exhibits P4A-P4J in his office under lock and key.

C On March 11, 1981 at about 1.50 a.m. he brought both accused persons to Balai Polis Jelutong to lodge a police report vide Report No.449 of 1981. Both accused were detained by the police on the same morning. Then, on March 12, 1981 at about 8.30 a.m. P.W.2 took exhibits P3 and P4A-P4J from the safe and instructed Seah Cheng Chuan (C.O.227) and Loo Yook Khin (C.O.3379) to pack them in a brown paper cardboard box which was subsequently marked and sealed with "Kastam & Eksais Di Raja Malaysia 91". On the same day together with Seah Cheng Chuan (C.O.227), he sent the exhibits to Jabatan Kimia Pulau Pinang for analysis. On arrival, he handed it to P.W.1 and received back the exhibit on the same day at about 2.30 p.m. Exhibit P3 was sealed with "Jabatan Kimia Pulau Pinang No.5". At about 2.30 p.m. he returned to his office and handed the exhibits to Supt. Hassan bin Arshad for safe keeping. At that time, Mr. Lum Weng Foo was also present. Subsequently, on March 25, 1981 he received the Chemist report (P5) from P.W.1.

The evidence of P.W.1 was to the effect that upon receipt of the exhibits from P.W.2 on March 12, 1981 he proceeded to analyse the contents of each package and found it to contain heroin. Package P4A had a nett weight of 418.7 grammes and the weight of heroin was 140.3 grammes. Package P4B weighed 458.7 grammes and the weight of heroin was 157.9 grammes. Package P4C had a nett weight of 458.2 grammes and the weight of heroin was 167.6 grammes. Package P4D had a nett weight of 449.3 grammes and the weight of heroin was 168.3 grammes. P4E weighed 433.9 grammes and the weight of heroin was 159.9 grammes. P4F had nett weight of 455.4 grammes and the weight of heroin was 180.0 grammes. P4G weighed 456.0 grammes and the weight of heroin was 178.7 grammes. P4H weighed 449.5 grammes and weight of heroin 153.7 grammes. P4I weighed 444.4 grammes and the weight of heroin 152.6 grammes. Lastly, P4J had a nett weight of 455.3 grammes and the weight of heroin was 149.7 grammes. Thus

the sum total of nett content of 10 packages was 4479.4 grammes with a total weight of heroin being 1608.7 grammes. From the evidence of P.W. 1, I accepted his conclusion and finding that the light brown granular substance in fact contained 1608.7 grammes of heroin as set out in the charge. Lastly, Mr. R. Venugopal (P.W.7), Senior Superintendent of Customs testified that from January 1, 1983 he resumed office after taking over duty from En. Hassan Arshad who was at the time of the present trial was attending a course in the United Kingdom. He took over from En. Hassan all the exhibits P3 and P4A to P4J which was kept in a steel cabinet and was placed inside the "strong room" with the combination lock. Here, I accepted his evidence.

At the close of the case for the prosecution, counsel for both accused persons submitted that the prosecution had not made out a *prima facie* case against both accused persons. The main complaints of the defence were as follows:

- i) there was material gap in the prosecution case for not calling the Investigating Officer Mr. Lum Weng Foo and the informant (who was identified and therefore did not come under the protection of section 40 of the Act), to testify for the prosecution.
- ii) The handling of the exhibits (P4A – P4J) – there was a break in the chain of the prosecution case by not calling the Investigating Officer and Superintendent of Customs, En. Hassan Arshad and
- iii) The evidence of the Chemist, P.W.1, was unsatisfactory.

With regard to the non-calling of the Investigating Officer, Mr. Lum Weng Foo, Mr. Karpal submitted that this was fatal to the prosecution case and it had at the same time prejudiced the defence for being unable to elicit any evidence which might be used to challenge the evidence of the agent provocateur, P.W.4. A number of persuasive authorities, in particular two Pakistani cases *Muhammad Sharif v. State*⁽¹⁾ and *A.K.M. Reza*⁽²⁾ (1958) PLD Dacca III at p. 113 were cited in support of this contention. Mr. Lum was present throughout the trial of this case. He was offered and made available to the defence. In the words of Good J.A. in *Samsudin v. Public Prosecutor*⁽³⁾:

"The defence, of course, would have much preferred them to be offered for cross-examination but in our opinion the prosecution were under no duty to take this course and it was sufficient that they made known to the defence the availability of these witnesses if they required them. This

A seems to us to be well settled law. We do not think it necessary to resort to extensive quotation from the many authorities which were discussed by this Court in the case of *Khoo Chye Hin v. Public Prosecutor*. It is clear from these authorities that the prosecutor has a discretion and also that if he does not call material witnesses who are available he runs the risk of having the presumption in illustration (g) to section 114 of the Evidence Ordinance raised against him. In the present case there was no attempt at concealment, no suggestion, as was said by Lord Thankerton in the case of *Adel Muhammed El Dabbah v. Attorney-General for Palestine*, 'that the prosecutor has been influenced by some oblique motive.' The witnesses were freely offered to the defence and in our opinion the presumption did not arise."

Again in *Abdullah Zawawi v. Public Prosecutor*⁽⁴⁾ it was held that the prosecution's right not to call a witness from whom statements have been taken must always be guided by its duty to discharge the onus of proof.

Based on the evidence of the prosecution as a whole, in my opinion the non-calling of the Investigating Officer was not fatal to the prosecution case.

E In the case of the informant, Francis, Mr. Kumaraendran submitted that he played a very active part in the negotiations between P.W.4 and Accused No.2. He should not be treated as an informant but as an agent provocateur, and in the circumstances, he should have been called by the prosecution. I could not agree that Francis should be treated as an agent provocateur. In my opinion, he was an informant whose identity was "blown" when subpoenaed by the defence and identified at this trial. He acted as the contact man for P.W.4. Even assuming that he was an agent provocateur, in my opinion it was a discretion of the prosecution whether or not to use him as its witness and the prosecution must always be guided by its duty to discharge the onus of proof. (*Abdullah Zawawi v. Public Prosecutor (supra)*).

H With regard to the handling of the exhibits, Mr. Sithambaram had submitted that there was a break in the chain of the prosecution evidence. I was satisfied after having considered the evidence of P.W.2 and P.W.7 there was no merit in the submission. Lastly, on the question of the unsatisfactory evidence of the Chemist, P.W.1, I must reiterate that I accepted his evidence. In *Au Ah Lin v. Public Prosecutor*⁽⁵⁾ Thomson L.P. held that the kind of provision with which we were dealing here did not require that samples be taken from the contents of every package or container in question. There was also no requirement of the taking of any

particular quantity and that the words "ten per-centum" referred to the package and not to the contents of each package.

In the final analysis, at this stage it was the duty of the Court merely to be satisfied that there was some evidence which was not inherently incredible to satisfy the ingredients of the offence with which both accused were charged. Indeed, in this case, I was satisfied that there was a *prima facie* case made out by the prosecution within the principles of *Haw Tua Tau* which if unrebutted would warrant a conviction. Accordingly, I ruled that there was a case to answer by both accused.

Defence

After the three alternatives having been explained, both accused persons elected to give evidence on oath. Briefly the defence of the accused No.1 was as follows. He stated that he knew accused No.2 about two months prior to the date of his arrest. On the material date he met accused No.2 at about 1.00 p.m. at Hotel Malaysia, Penang Road after he had his hair washed in the hotel. Accused No.2 invited him for a drink at the coffee house. After a brief conversation accused No.2 asked him whether he was free to give him (accused No.2) a lift to fetch a friend at Sunrise Tower to go to Rasa Sayang Hotel. He obliged him. He told accused No.2 that he would wait for him at the Hotel Continental car park. He saw accused No.2 carrying a brown coloured bag to his car. The bag similar to P3 was bulky. Then, they left for Sunrise Tower. Accused No.2 was seated next to the driver's seat with his brown bag on his laps. Near Sunrise Tower he noticed a male Indian standing by the road side. Accused No.2 asked him to stop to give this man a lift. He was introduced by accused No.2 as Francis. The three of them then proceeded to Rasa Sayang Hotel.

On reaching Rasa Sayang, he parked his car at the car park and accompanied Accused No.2 and Francis into the hotel. Accused No.2 told him that he wanted to look up a friend and would like him to give him a lift back to town. Accused No.2 had left his brown bag inside the car. Accused No.1 asked him why he did not carry the bag along. He replied saying that he would leave the bag behind. When they reached the hotel lobby Francis told them that he wanted to make a phone call. Accused No.1 then followed both of them to the 3rd floor. They entered a room occupied by P.W.4, who was introduced by accused No.2 as "Ray." They spent about 10 to 15 minutes in the room.

A Accused No.2 had conversation with P.W.4. Then accused No.2 asked accused No.1 to collect his brown bag in the car. He went down with Francis to collect the bag and returned into the hotel lobby. While waiting for Francis to make a phone call from the lobby, accused No.1 placed the brown bag on the floor. He stood about 20 feet away from the poster board. Suddenly, a Customs Officer identified as P.W.2 touched him from the back, identified himself and placed him under arrest.

C In answer to Counsel's questions, accused No.1 denied that he was introduced to P.W.4 by accused No.2 as the supplier of the drugs. He also denied that he counted the cash of \$130,000.00 in P.W.4's room. He had no knowledge of the bag P3 and its content and lastly he denied being involved in any drug trafficking transaction on that particular day.

D Under cross-examination, he agreed that he met accused No.2 more than one occasion. He denied that he was ever introduced to accused No.2 by a person named "Hock Huat". He also denied that he agreed with accused No.2 that he could supply 10 lbs. of heroin for an Australian buyer. He also denied that he met accused No.2 on March 10, 1981 by prior arrangement. It was a chance meeting.

F From the evidence of accused No.1, it was clear that his defence was that he was an innocent carrier of the brown bag (exh.P3) which contained heroin, the subject matter of the charge and that he had no knowledge of its contents whatsoever. Again from his testimony it was also his defence that he was a good samaritan giving a helping hand to a casual friend whom he knew only about two months prior to the day he was arrested. He testified that he met accused No.2 by chance and spent about one hour in the coffee house of Hotel Malaysia having some casual conversation. From there onwards he agreed (which undoubtedly he must have taken a great risk) to give a lift in his car to accused No.2 firstly to Sunrise Tower, Gurney Drive to fetch a friend, later identified as Francis, and secondly to chauffeur accused No.2 and Francis to Rasa Sayang Hotel to meet another friend. In the circumstance, I could not accept I accused No.1's explanation of a chance meeting with accused No.2. He never asked Accused No.2 why they were going to the Rasa Sayang to meet this friend. Strange as it may seem, accused No.1 saw Accused No.2 carrying this brown bag P3 throughout the journey from Hotel Malaysia to Rasa Sayang Hotel. Yet, he never asked accused

No.2 about the contents of the bag which he stated was bulky and accused No.2 had with him on his laps. What he asked was merely why accused No.2 did not take along the bag with him from the Rasa Sayang car park into the hotel. According to him, Accused No.2 replied saying he would leave the bag behind. Surely this was not a reason at all. If it was, it must be the most ridiculous explanation.

At Rasa Sayang Hotel he was introduced by accused No.2 to P.W.4. According to him while accused No.2 and P.W.4 had some conversation in room 303 he sat down admiring the interior decoration of the room. He said he did not pay any attention nor could he recall the topic of their conversation. Then, about 10 to 15 minutes later he was asked by accused No.2 to go to his car with Francis to collect the bag P3. Again, I found his explanation of what had transpired in room 303 as unreasonable and improbable. His denial of any knowledge of what had transpired between P.W.4, accused No.2 and himself was a complete fabrication.

Upon evaluating his evidence as a whole, it was my finding that his defence of having no knowledge of the contents of P3 was totally unacceptable. He cannot be just an innocent carrier of P3 which contained the drugs at the time of his arrest at the Rasa Sayang Hotel lobby. From the prosecution evidence and in particular the evidence of P.W.4 I was satisfied that accused No.1 was engaged in drug trafficking transaction together with accused No.2 on March 10, 1981 in room 303 of the Rasa Sayang Hotel. And from the evidence of P.W.2 and P.W.5 I was equally satisfied that he was in possession of the bag P3 and knew its contents, P4A —P4J, sufficient to attract the presumptions of trafficking under section 37(d) and (da) of the Dangerous Drugs Act. Even without the aid of the presumptions, I was fully satisfied that the prosecution had proved the case against accused No.1 beyond reasonable doubt within the meaning of section 2 of the Act. Therefore, the question asked was whether or not Accused No.1 had given an acceptable explanation to rebut the presumptions under section 37(d) and (da) of the Act? In my judgment, he had failed to do so.

Accordingly I found accused No.1 guilty as charged and I entered a conviction against him.

In the case of accused No.2, his defence was that he was an informer's informer trying to assist Francis, to use his counsel's words, "to flush out would-be drug traffickers". In his defence, accused

A No. 2 related how he became to be one. According to him he was first in contact with one Ah Chong, a driving instructor sometime in October 1980. They met somewhere in a coffee shop at KOMTAR, where Ah Chong asked him if he could get a supplier of heroin for his friend, Francis. Ah Chong told him that Francis helped the police to get drug pushers and he would be rewarded for his service. About two weeks later Ah Chong met him again by chance in Penang Road and took him to meet Francis at Nordin Street flats. It was at this meeting Francis told him of a European buyer of heroin. A few weeks later, both Ah Chong and Francis came to look him up to find out whether he had found a supplier. He told them that he would see a friend at Chulia Street and wanted them to give him a lift. He met this friend in a bar in Chulia Street who told him that he wanted half of the payment to be paid in advance. This, according to him, Francis could not agree. In the meantime, Francis told him to keep Ah Chong out from further drug dealings so that the monetary reward could only be shared between both of them. Francis asked him to look for another supplier.

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The next potential supplier he got was a friend who was a drug addict. It was sometime in December when he was passing Chulia Street that he saw this person. He promised to get a sample from his boss. About half an hour later, he brought a sample which accused No. 2 took to Francis. When he met Francis, the latter showed him a telegram saying that his Australian buyer was coming to Penang soon. Francis asked him to look him up again a week later. On the appointed day, he met Francis at the Esplanade. From there they proceeded to E & O Hotel where he was introduced by Francis to P.W.4. According to accused No.2 they met on four occasions to negotiate for the sale of drugs. On one occasion the negotiation was abortive. It was sometime in January or February 1981 that he managed to find a supplier. He went to see Francis at his house but did not take him to meet the supplier. Finally, sometime in early March 1981 one Hock Huat introduced him to accused No.1 as the supplier of heroin. They discussed the terms of the sale and the price agreed was \$13,000.00 per pound. Accused No.2 handed a sample of the drugs which he received from accused No.1 to Francis. A few days later Francis informed him that the sample was acceptable and he should tell his supplier to get the drugs ready. Francis also told him that the transaction would take place on March 10, 1981. On the appointed day, through Francis accused No.2 met P.W.4 at

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Hotel Merlin coffee house where they discussed the plan for the transaction to take place on the same afternoon.

Accused No.2 further testified that later that morning he left for Hotel Malaysia to wait for Francis. There he telephoned accused No.1 who came to the hotel at about 10.00 a.m. Whilst having coffee at the coffee house he received a call from Francis who was waiting at Sunrise Tower. He left in accused No.1's car. From Sunrise Tower they went to Botanical Garden where Francis told him that it was too early to go to Rasa Sayang Hotel. This was the first time he knew about going to Rasa Sayang Hotel. On arrival at Rasa Sayang, the three of them went up by lift to room 303 occupied by P.W.4 who asked him if accused No. 1 was the supplier. P.W. 4 then opened a brief case and showed accused No. 1 money. Accused No. 1 counted it. After the counting had completed, according to accused No.2, accused No.1 told P.W. 4 that the heroin was in his car. Accused No.1 went down with Francis to collect the drugs. Before leaving the room, P.W.4 told Francis to check the drugs before bringing it to the room. He also told Francis to contact him by phone from the lobby. Accused No.2 remained with P.W.4 in his room. P.W.4 told him that the transaction was a success and that he would get his reward. He said that P.W.4 asked him to go to Mandarin Hotel to collect the payment for reward from Francis. Then, P.W.4 told him that something had gone wrong in the lobby and asked him to go down. When he came down looking for Francis he was arrested by customs officers at the main entrance of the hotel. Under cross-examination, he denied that he had committed any offence because he was merely assisting Francis and P.W.4 to arrest drug traffickers and in return he would get a reward for his services.

In evaluating the defence of Accused No.2 I must at the very outset state that I could not accept the existence of Ah Chong, Hock Huat and an unnamed drug addict. It was too simple a story to believe that he was able to get people like Ah Chong or Ah Huat to provide him with the drugs or introduced him to suppliers as and when he wanted them. In short, these people were simply a figment of his imagination. Secondly, his defence that he was merely assisting Francis to flush out drug traffickers in return for monetary reward was in the circumstances of the case most improbable. From the testimony of P.W.4 I found accused No.2 had played a very active role in this drugs transaction, the subject matter of the charge. Right from

A their preliminary meetings in Penang in September 1980 until the final transaction on March 10, 1981 in room 303 of Rasa Sayang Hotel, culminating in his arrest outside the hotel lobby, the part he played could not by any stretch of imagination be considered to be that of a mere informer. According to P.W.4 accused No.2 had negotiated and made the arrangement for the delivery of the heroin. All in all they met four times and on these four occasions Francis was present. On the evidence of P.W.4, Francis was the contact man between him and accused No.2. Thus, from the evidence of P.W.4 whose evidence I had no reason to disbelieve, it was my finding that accused No.2's defence that he was an informer's informer could not in the circumstances of the case be reasonably true.

D On the authority of *Mat v. Public Prosecutor*⁽⁶⁾ when considering the evidence of the defence of the accused, the Court should approach it on the premise that it was not for the Accused to prove anything but merely to give an explanation consistent with his innocence. The Court must then consider whether such explanation might reasonably be true although not convinced of its truth. It follows that if the Court accepted the explanation it must acquit. However, the accused was still entitled to an acquittal if the explanation raised a reasonable doubt as to his guilt as the onus of proving the guilt was throughout on the prosecution. If upon considering the whole evidence the Court was left in a real state of doubt, obviously the prosecution had failed to prove the case against the accused. In such circumstances, he was entitled to an acquittal. Therefore in coming to my decision on Accused No.2, it was my finding that the explanation given by him did not meet these requirements. On the other hand, I was satisfied that upon the evidence tendered as a whole, the charge against him had been established beyond all reasonable doubt. Accordingly, I found accused No.2 guilty as charged and entered a conviction against him.

I In conclusion, I must state here that I accepted P.W.1, P.W.2, P.W.4 and P.W.5 as witnesses of truth. In the case of P.W.4 I considered him to be an agent provocateur and not as an informer as submitted by counsel for accused No.2. I accepted his entire evidence of the negotiations that took place between him and accused No.2 and later of the transaction held in room 303 of Rasa Sayang Hotel between him and accused No.1 together with accused No.2 on the material date. Although there was discrepancy in his evidence, but after having

considered the whole of his evidence I came to the conclusion that it was not so material as to affect his credibility (see *Public Prosecutor v. Tahir bin Kassim*).⁽⁷⁾ With regard to his position as an agent provocateur, section 40A(1) of the Act provides that his testimony was not to be presumed unworthy of credit by reason only of his having attempted to abet or abetted the commission of an offence by any person under section 39B if the attempt to abet or abetment was for the sole purpose of securing evidence against such person.

Lastly, I was satisfied from the conduct of both accused persons which started, perhaps, from the time they were together at Hotel Malaysia until the time they were arrested at Rasa Sayang Hotel, there was a prearranged plan to commit the offence. It was not necessary to reenact their movements on the day in question. Suffice it to infer from such movement and conduct that they had acted with common intention under section 34 of the Penal Code. (See *Mahbub Shah v. King Emperor*).⁽⁸⁾

Sentence

As the offence was committed before April 1983, the Court had a discretion with regard to punishment on conviction. The amount of drugs recovered was substantial which was 1,608.7 grammes. I accepted that both accused persons are young men and are first offenders. However, on their plea of mitigation, I found no extenuating circumstances whereby I could exercise my discretion to impose a sentence of life imprisonment. (See *Public Prosecutor v. Tan Hock Hai*).⁽⁹⁾ Both were jointly charged and were found guilty of a serious offence. For the above reasons I sentenced both accused persons to death.

[Both the accused appealed to the Supreme Court]

SUPREME COURT.

R. Rajasingam for the 1st appellant.

K. Kumaraendran (V. Sithambaram with him) for the second appellant.

Mohhtar Abdullah (Deputy Public Prosecutor) for the respondent.

Cur. Adv. Vult.

Abdul Hamid C.J. (Malaya) (delivering the Judgment of the Court): In both the appeals, Teoh Hoe Chye (first appellant) and Yeap Teong Tean (second appellant) are appealing against the whole of the decision of the learned Judge of the High Court at Penang (Criminal Trial No. 6/81)

A where both were convicted and sentenced to death on a charge which reads as follows:

B "That you jointly on March 10, 1981 at about 4.30 p.m., in the lobby of Raja Sayang Hotel, Batu Ferringhi, in the District of Georgetown, in the State of Penang, in furtherance of the common intention of you both, did on your own behalf traffic in dangerous drugs, to wit, 1608.7 grammes of heroin and that you have thereby committed an offence under section 39B(1)(a) of the Dangerous Drugs Act, 1952 and punishable under section 39B(2) of the same Act read with section 34 of the Penal Code."

C The case for the prosecution revealed that as a result of information received, a U.S. Drug Enforcement Administration Agent (the agent) was introduced to the second appellant sometime in December 1980. A few meetings took place subsequently. The purchase of the heroin was discussed among the agent, the second appellant and the informant. Sometime in March, 1981, the purchase price was agreed and the second appellant was to arrange for the supplier to deliver the drugs to a hotel room. A plan was conceived. As part of the plan the informant was to fetch the second appellant and the supplier from some place and take them to a room at Rasa Sayang Hotel to meet the agent. The informant would then accompany the supplier (identified by the agent as the first appellant) to collect the heroin while the agent was to wait in the room. It was also part of the plan that the informant would give a signal after the first appellant had collected the drugs.

F On March 10, 1981, at about 2.55 p.m., a party of eight customs officers took up position at Rasa Sayang Hotel. At 3.50 p.m. the second appellant arrived at Room 303, Rasa Sayang Hotel, with the informant and the first appellant. After the bag containing the money was inspected by the first appellant, the informant accompanied him to a car parked at the hotel car park.

H At about 4.20 p.m. Encik Low Tak Fun, Superintendent of Customs (Supt. Low), a member of the customs ambush party, saw the first appellant walking to the lobby carrying a brown bag and proceeding towards a poster board. The first appellant placed the bag on the floor and waited there. Supt. Low then saw the informant who was near the in-house telephone booth giving the prearranged signal to effect arrest by lifting up the phone. Upon arrest Supt. Low took possession of the brown bag. From there he took the first appellant to the car parked under the porch in front of the hotel lobby. Inside the car Supt. Low examined the bag and found 10 packages wrapped in brown paper. Meanwhile the informant phoned

the agent to tell him and the second appellant that the first appellant had been arrested. Both the agent and the second appellant came down to the lobby. The second appellant was then arrested.

From the hotel both the first and second appellants were taken to Supt. Low's office at Weld Quay, reaching there at about 5.20 p.m. While they were there, Supt. Low handed the bag which was believed to contain the drugs to the Superintendent of Customs, Lum Weng Foo (Supt. Lum). No evidence was led as to what Supt. Lum did with the exhibits. The evidence however disclosed that at approximately 7.40 p.m. on that evening Supt. Low arrived at the Customs Office accompanied by Mr. Law Yong Tong, the chemist, who conducted an initial test of the drugs. After the test, Supt. Low said that he weighed the 10 packages and kept the exhibits in his office under lock and key.

A number of grounds were raised in this appeal, the principal argument was that the learned trial Judge had erred in law in not concluding that the non-calling of Supt. Lum, the Investigating Officer, was fatal to the prosecution case. Further, that the learned Judge had erred in not concluding that there was a break in the chain of evidence relating to the exhibits.

Fundamentally, the matter in issue is not whether there was a failure to call or not to call the Investigating Officer but whether the failure to call a particular witness gave rise to a serious gap in the prosecution case.

In the instant case, Supt. Low testified to the effect that he handed over the exhibits at his office to Supt. Lum, the Investigating Officer, at about 5.20 p.m. He apparently left the office to return only at about 7.20 p.m., some 2 hours 20 minutes later, with the chemist who carried out an initial test to determine whether the exhibits seized were in fact drugs. Supt. Low said that the chemist did confirm they were drugs. However the chemist himself did not testify to that effect. But what is more crucial is how and in what manner the exhibits came back to Supt. Low's custody. There was no evidence adduced by the prosecution to show exactly what had happened to the exhibits between the time of handing over by Supt. Low to Supt. Lum and the subsequent examination by the chemist.

The following questions may be asked: what did Supt. Lum do with the exhibits after he re-

A ceived them from Supt. Low; where did he keep them; were they kept under lock and key; and did Supt. Lum return to Supt. Low the very same exhibits he received from Supt. Low. The answers to these questions are highly pertinent to a proper determination of the identity of the exhibits.

B A very vital link in the prosecution case seems to be missing. The point was, in our view, rightly taken by counsel for both the appellants when they contended that there was a serious break in the chain of evidence affecting proof as to the identity of the exhibits. It is a question of proof whether in fact the exhibits produced were the exhibits that were seized, handed over to Supt. Lum and returned by him to Supt. Low and then kept by the latter under lock and key until they were produced in Court.

D As it was clear that Supt. Lum was given custody of the exhibits soon after the arrest of the appellants, it is reasonable to assume that police statements would have been taken from him and that he would ordinarily have been called to give evidence. He was however not called. Nevertheless, the decision whether to call or not to call a witness including a witness from whom a statement has been taken is always the right of the prosecution (*Abdullah Zawawi v. Public Prosecutor*).⁽⁴⁾ Insofar as the trial Court is concerned, its duty is essentially to decide whether on the evidence before it the prosecution has proved its case, and if there are unsatisfactory features in the prosecution case to determine whether, in the light of such features, the prosecution case fell short of proof beyond reasonable doubt (*Abdullah Zawawi's case, supra*).

G We would observe at this point that the law is clear in that "it is unnecessary to call evidence to ensure there is no break in the chain of evidence." (*Su Ah Ping v. Public Prosecutor*).⁽¹⁰⁾ But where a doubt as to the identity of an exhibit arises, a failure to adduce evidence to provide the necessary link in the chain of evidence would be fatal to the prosecution case. In the instant case there was such a failure.

I Supt. Lum would clearly have been able to provide the missing link in the chain of evidence if he had been called to give evidence for the prosecution. For some unknown reasons he was not called. In our view, it was clear that in the particular circumstances of this case, the failure to call this witness had caused a serious break in the chain of evidence relating to the identity of the exhibits.

The break was so serious that we do not think there is any statutory cure. We would add that any attempt in such a case to apply the provisions of section 60(1) of the Courts of Judicature Act, 1964, would amount to a relaxation of the law of criminal procedure to such an extent as to deprive an accused person of his right. In this regard, it behoves us to reiterate that "the requirement of strict proof in a criminal case cannot be relaxed to bridge any material gap in the prosecution evidence. Irrespective of whether the Court is otherwise convinced in its own mind of the guilt or innocence of an accused, its decision must be based on the evidence adduced and nothing else and therefore the appeal must be allowed and the conviction quashed." (*Sia Soon Suan v. Public Prosecutor*).⁽¹¹⁾

In the circumstances of this case, it is our considered view that the appeal of the two appellants should be allowed and their conviction set aside and be substituted by an acquittal and discharge.

Appeal allowed.

Solicitors: *Rajasingam & Co.; Kumar & Co.*

HOCK HUA BANK BHD. v. LEONG YEW CHIN

[S.C. (Abdul Hamid Ag. L.P., Seah & Syed Agil Barakbah S.C. JJ.) March 25 & September 20, 1986]

[Kuala Lumpur — Supreme Court Civil Appeal No. 278 of 1985]

Practice and Procedure — Application to amend statement of claim after expiration of limitation period — Amendment introducing new cause of action — New cause of action founded on the same or substantially same facts as original cause of action — R.H.C. 1980 O.20, r.5.

In this case the respondents had caused a writ accompanied by a statement of claim to be issued against the appellants on October 8, 1980. The matter related to a claim in 1974. On December 3, 1984, the respondents applied for an amendment of the statement of claim to introduce a new cause of action. The proposed amendment amounted to the contention that the refusal to credit the amounts debited to the respondent's account with the appellant bank amounted to a conversion of the amounts, alternatively the amounts so debited were payable to the respondents as moneys had and received by the appellants to the respondent's use. The Senior Assistant Registrar dismissed the application but on appeal it was allowed by the learned Judge of the High Court. The appellants appealed. It

A was common ground that the application to amend was made after the expiry of the period of limitation current at the date of the issue of the writ. It was also common ground that the proposed amendment raised a new cause of action adding substantially a new relief. However it was not in dispute that the new cause of action arose out of the same or substantially the same facts as the cause of action in respect of which relief had already been claimed.

B Held (by a majority, Seah S.C.J. dissenting) dismissing the appeal: the court has power to grant an amendment after the expiry of the limitation period notwithstanding that the effect of the amendment will be to add or substitute a new cause of action, subject to the very important condition, namely that the new cause of action must arise out of the same or substantially the same facts as the cause of action in respect of which relief had already been claimed.

Cases referred to:

- (1) *Rodriquez v. Parker* [1967] 1 Q.B.116.
- (2) *Mitchell v. Harris Engineering Co.* [1967] 2 Q.B.703, C.A.
- (3) *Letang v. Cooper* [1965] 1 Q.B.232, 242-3.
- (4) *Government of Malaysia v. Mohamed Amin bin Hassan* [1986] 1 M.L.J. 224.
- (5) *Birkett v. James* [1978] A.C. 297, 317.
- (6) *Yamaha Motor Co. Ltd. v. Yamaha Malaysia Sdn. Bhd.* [1983] 1 M.L.J. 213.
- (7) *Chatsworth Investments Ltd. v. Cussins (Contractors) Ltd.* [1969] 1 All E.R.143.
- (8) *Brickfield Properties Ltd. v. Newton* [1971] 3 All E.R.328.

SUPREME COURT.

F *Peter K.C. Yeoh (Mohamed Hashim bin Mohamed with him) for the appellants.*

Raja Abdul Aziz Addruse (Chew Biman with him) for the respondents.

Cur. Adv. Vult.

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H Abdul Hamid Ag. L.P.: This appeal is against the decision of V.C. George J. granting the respondents leave to amend the statement of claim after the expiration of the limitation period. The respondents had caused a writ accompanied by a statement of claim to be issued against the appellants on October 8, 1980. The matter relates to a claim in 1974. On December 3, 1984, the respondents took out 0.25 summons for directions seeking, *inter alia*, an amendment of the statement of claim to introduce a new cause of action, the nature of which is described by the learned Judge as follows:

I "The proposed amendment in effect amounted to the contention that the said refusal to credit the amounts debited to the plaintiff's account with the defendant bank amounted to a conversion of the amounts, alternatively the amounts so debited are payable to the plaintiffs as moneys had and received by the defendants to the plaintiffs' use."